(2)

Supreme Court, U.S.
FILED

JUL 18 2002

OFFICE OF THE CLERK

No. 01-1629

IN THE

Supreme Court of the United States

STATE OF MARYLAND,
Petitioner,

v.

CLARENCE CONYERS, JR.,
Respondent.

On Petition For Writ of Certiorari To The Court of Appeals of Maryland

REPLY TO BRIEF IN OPPOSITION

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

GARY E. BAIR*
Solicitor General

ANNABELLE L. LISIC
Assistant Attorney General

Office of the Attorney General
Criminal Appeals Division
200 Saint Paul Place
Baltimore, Maryland 21202
(410) 576-6422

Counsel for Petitioner

**Counsel of Record*

TABLE OF CONTENTS

Page

REPLY ARGUMENT 1

I. THE STATE DID NOT OFFER PERJURED TESTIMONY BY A DETECTIVE WITH RESPECT TO INFORMATION PROVIDED BY A GOVERNMENT WITNESS. 2

II. TRIAL COUNSEL WAS NOT INEFFECTIVE IN EXAMINING A GOVERNMENT WITNESS AND STIPULATING TO TESTIMONY REGARDING VERIFICATION OF INFORMATION PROVIDED BY THAT WITNESS. 3

III. SENTENCING COUNSEL WAS NOT INEFFECTIVE IN PRESENTING MITIGATING EVIDENCE. 5

IV. THE STATE'S CLOSING ARGUMENTS DID NOT VIOLATE DUE PROCESS. 7

CONCLUSION 9

TABLE OF AUTHORITIES

Cases:

Burger v. Kemp, 483 U.S. 776 (1987) 6

Darden v. Wainwright, 477 U.S. 168 (1986) 6, 7

Donnelly v. DeChristoforo, 416 U.S. 637 (1974) 7

Exxon Co., U.S.A. v. Sofec, Inc.,
517 U.S. 830 (1996) 3

Glover v. United States, 531 U.S. 198 (2001) 1

Goodman v. Lukens Steel Co., 482 U.S. 656 (1987) .. 3

Graver Mfg. Co. v. Linde Co., 336 U.S. 271 (1949) .. 3

Royal v. Taylor, 188 F.3d 239 (4th Cir. 1999) 6

Strickland v. Washington,
466 U.S. 668 (1984) 3, 5, 7

United States v. Doe, 465 U.S. 605 (1984) 3, 6

United States v. Nobles, 422 U.S. 225 (1975) 2

Washington v. Yakima Indian Nation,
439 U.S. 463 (1979) 1

REPLY ARGUMENT

In his brief in opposition, Conyers presents four additional issues to the Court not addressed in the petition for writ of certiorari, relying on the principle that he is permitted to "defend the judgment of the Maryland Court of Appeals requiring a new trial 'on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by' the Court of Appeals." (Brief in Opp. at 11) (quoting *Washington v. Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979)). The new questions he raises are as follows[1]:

1. Did the State offer perjured testimony by a detective with respect to information provided by a government witness?

2. Was trial counsel ineffective in examining a government witness and stipulating to testimony regarding verification of information provided by that witness?

3. Was sentencing counsel ineffective in failing to present mitigating evidence?

4. Did the State's closing arguments at trial and sentencing violate Due Process?

Because these four issues raised by Conyers were not considered and decided by Maryland's highest court (App. 60a), as Conyers concedes, (Brief in Opp. at 11), this Court should, as a matter of policy, decline to address them. *See Glover v. United States*, 531 U.S. 198, 205 (2001) (Court will normally not decide questions neither

---

[1] Conyers raises these claims as Questions Presented 2 through 5, but addresses them in the body of the brief as Arguments 4 through 7.

raised nor resolved by the courts below and, "[a]s a general rule . . . do[es] not decide issues outside the questions presented by the petition for certiorari."); *United States v. Nobles*, 422 U.S. 225, 241-42 n.6 (1975) (Court will "decline to entertain" questions presented by a respondent "in the absence of . . . an indication that the issues are of sufficient general importance to justify the grant of certiorari," or when there is no "strong suggestion of an abuse" of trial court discretion.). The issues Conyers attempts to bring before the Court in opposing the grant of a writ are without merit, as the highest state court to consider them properly found, and do not independently support the judgment of the Court of Appeals of Maryland.[2]

I.

THE STATE DID NOT OFFER PERJURED TESTIMONY BY A DETECTIVE WITH RESPECT TO INFORMATION PROVIDED BY A GOVERNMENT WITNESS.

This issue is addressed in footnote 2 at page 11of the State's petition for writ of certiorari.

---

[2] The dissent in the Court of Appeals of Maryland stated that, while "[t]he majority does not address the other issues . . . were I writing for the majority of the Court, I would affirm on all issues presented." (App. 64a).

II.

TRIAL COUNSEL WAS NOT INEFFECTIVE IN EXAMINING A GOVERNMENT WITNESS AND STIPULATING TO TESTIMONY REGARDING VERIFICATION OF INFORMATION PROVIDED BY THAT WITNESS.

Conyers alleges that counsel were ineffective at trial and re-sentencing for failing to adequately investigate the background of Charles Johnson and for conducting an ineffective cross-examination of Johnson. The applicable standard for assessing counsel's performance is well-established. A defendant claiming ineffective assistance of counsel must show that (1) "counsel's representation fell below an objective standard of reasonableness," and (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

Because Conyers is merely asking this Court to consider the application of *Strickland* to the facts of his case, this Court should decline to hear this issue, as it is a court of law, not a court for correction of errors in fact findings. *See Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949). *Accord Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 840-41 (1996); *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987); *United States v. Doe*, 465 U.S. 605, 613-14 (1984). In any event, the decision of the post conviction court was a correct application of *Strickland*.

Before considering Conyers's specific claims regarding

the effectiveness of counsel, the state post conviction court noted the extensive credentials of the attorneys who represented Conyers at trial, at re-sentencing, and on appeal. (App. 92a, 111a). With respect to two of the areas Conyers claims counsel should have explored in cross-examining Johnson--the Wendy's robbery, which was the basis for the indictment pending against Johnson while he was Conyers's cell mate, and the records at Murry's Steaks--the post conviction court noted the exercise of discretion on the part of counsel in foregoing these topics because of the possibility of doing more harm than good. (App. 103a, 114a-15a). With respect to Johnson's alleged failure to file certain tax returns, the post conviction court found that the records did not necessarily indicate a failure to file when required to do so. (App. 104a).

Conyers additionally finds fault with the decision of counsel to stipulate at re-sentencing to Detective Marll's opinion testimony with respect to the truthfulness of Johnson's statements. As discussed in footnote 2 of the State's petition, at trial Marll provided a laundry list of those statements which Johnson could only have learned from Conyers. At re-sentencing, counsel sought, and successfully obtained, the State's agreement to generalize Marll's opinion, believing that such testimony was especially damaging at the first sentencing. The post conviction court concluded that counsel was not ineffective in agreeing to the extent of Detective Marll's testimony, noting that counsel "did an excellent job in getting the State to capsulize the previously devastating testimony into a momentary, generalized answer with no details." (App. 119a).

A reading of the cross-examination of Charles Johnson at trial and re-sentencing demonstrates that counsel

adequately investigated his background and carefully chose a strategy in questioning him that would reflect negatively on Johnson's credibility. Counsel intentionally avoided any questioning that might bolster Johnson's credentials in the eyes of the fact finders. The record establishes that the fact findings and credibility determinations of the state court were not clearly erroneous and that its ultimate holding that counsel were not ineffective in examining Charles Johnson or in stipulating to certain testimony was based on a proper application of the *Strickland* standard. There is no need for further review by this Court.

III.

SENTENCING COUNSEL WAS NOT INEFFECTIVE IN PRESENTING MITIGATING EVIDENCE.

Again, as stated previously, the Court need not review the application of *Strickland* to Conyers's claims that counsel failed to present mitigating evidence at re-sentencing. Since counsel did, in fact, present mitigating evidence at sentencing, what Conyers is claiming is that there was another way to present it and failure to follow another path constituted ineffective assistance of counsel. Such a position is totally contrary to the standard under which this Court judges ineffective assistance of counsel claims. That another attorney might have done things differently does not constitute ineffectiveness. In this case, defense counsel considered what strategy would be most effective and conducted their case accordingly. That it ultimately failed does not make their effort deficient.

Conyers's argument with respect to mitigating evidence centers on his allegation that counsel should have done more to present evidence of his relationship with his family. The post conviction court disagreed, finding that, in addition to favorable family background information contained in the Pre-Sentence Investigation, Conyers's mother testified at length, with no cross-examination by the State, to Conyers's upbringing and the good relationship he had with family members. (App. 117a). Further, counsel reviewed a social history and an evaluation by a forensic psychiatrist and made a tactical decision not to present this testimony. (App. 118a). The state court found the decisions of counsel to be "well-informed and well-reasoned." (*Id.*).

The findings of the post conviction court are supported by the record. The decision as to what to present in the way of mitigating evidence to the sentencing jury is quintessentially a tactical decision on the part of defense counsel. That decision is based on the circumstances of each case and is accorded a high degree of deference. *Burger v. Kemp*, 483 U.S. 776, 788-89 (1987); *Darden v. Wainwright*, 477 U.S. 168, 185-86 (1986). This Court has repeatedly upheld as a plausible tactical decision even the failure to present at a capital sentencing proceeding any mitigation evidence at all beyond the defendant's own remarks. *See Burger v. Kemp*, 483 U.S. at 788-96; *Darden v. Wainwright*, 477 U.S. at 184-87. Further, relying on personal history evidence as a mitigating factor in sentencing can be a "double-edged sword." *Royal v. Taylor*, 188 F.3d 239, 249 (4th Cir. 1999). The post conviction court correctly held that counsel were not constitutionally ineffective with respect to presenting mitigating evidence at re-sentencing, and there is no sound

basis for further review of the issue.

IV.

THE STATE'S CLOSING ARGUMENTS DID NOT VIOLATE DUE PROCESS.

Because there was no objection made at trial or sentencing to the State's closing arguments, the issue Conyers raised in state post conviction was that counsel were ineffective in failing to object to remarks made by the prosecutor during closing arguments. Again, this Court should decline to review the application of the *Strickland* standard to the fact-specific issue of counsel's actions in regard to the State's closing arguments. This Court has long held that, in considering claims of improper comments by a prosecutor, "[t]he relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Darden v. Wainwright*, 477 U.S. at 181(quoting *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974)).

The post conviction court correctly held that comments by the prosecutor at trial relevant to Johnson's testimony were reasonable and legitimate inferences which could be drawn from the evidence. (App. 110a). Further, according to the court, the State had every right to characterize Conyers as a murderer in forceful and emotional language. (App. 104a). Given that the State's argument was entirely proper, there was no reason for trial counsel to object.

Conyers also points to a number of instances in the State's closing at re-sentencing, claiming that the

argument was so flawed that no competent attorney would have allowed it to continue without objection. The post conviction court disagreed, finding the comments of the prosecutor to be well within the bounds of proper argument. (App. 122a-124a). A complete reading of the prosecutor's argument at re-sentencing supports the state court's conclusion and demonstrates no constitutional flaw. Again, the State was free to comment on the type of person who would commit the crimes for which Conyers was convicted, especially at sentencing where guilt was no longer the issue. The State was, likewise, free to describe the final moments of the victims' lives based on the evidence. As the post conviction court concluded, there was no impermissible shifting of burdens on the part of the prosecutor.

Given the propriety of the State's closing argument, defense counsel cannot be faulted for failing to object. Thus, Conyers has failed to establish any deficiency in his attorneys' performance at trial or re-sentencing with respect to closing argument. For that reason, his claim of ineffective assistance of counsel in this regard was properly rejected by the state court and does not offer a basis for further review by this Court.

CONCLUSION

For the foregoing reasons, the State of Maryland respectfully requests that this Court issue a writ of certiorari to review the judgment of the Court of Appeals of Maryland, limited to the question presented by Petitioner.

Respectfully submitted,

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

GARY E. BAIR*
Solicitor General

ANNABELLE L. LISIC
Assistant Attorney General

Counsel for Petitioner

**Counsel of Record*

July, 2002